

The Burger Court and Labor Law: The Beat Goes On — *Marcato*[†]

WILLIAM B. GOULD IV*

Focusing on a wide range of substantive arenas, Professor Gould analyzes many of the major labor law decisions of the Burger Court. He begins by comparing the Court's methodology with that of the Warren Court and asserts that the Burger Court has in many instances simply expanded on themes developed by its predecessor. He also discusses areas in which the Burger Court has broken new ground. Finally, Professor Gould concludes that the Burger Court has accelerated the pendulum in a direction in which it was already swinging — against the interests of organized labor.

INTRODUCTION

The Warren Court's life span was sixteen years — from 1953, when President Eisenhower appointed Governor Warren to the Court as Chief Justice, until 1969, when President Nixon accepted his resignation. In a sense, however, it might be said that the Warren Court has its genesis in its landmark civil liberties decisions of 1957 when the Court's working majority issued a series of rulings possessing a pronounced liberal flavor. Similarly, some of the most significant Burger Court employment opinions were rendered just within the past decade. Thus the philosophical stance of each Court

† This Article is based upon a paper delivered at the *Sixteen Years of the United States Supreme Court Under the Leadership of Chief Justice Warren E. Burger* Conference at Hofstra University School of Law on November 7, 1985.

* Charles A. Beardsley Professor of Law, Stanford Law School. A.B., 1958, University of Rhode Island; LL.B., 1961, Cornell University; Graduate study in comparative labor law, 1962-1963, London School of Economics; LL.D (honorary), 1986, University of Rhode Island. The author is grateful for research assistance provided by Anthony Amendola.

developed after a period of time.

In any event, the Burger Court served a period of time which was slightly more than that of the Warren Court — seventeen years, from 1969 through 1986. Its legacy in arenas of the latter's innovations such as racial segregation, reapportionment and criminal procedure, is not a ground-breaking one. If for no other reason, however, than the sheer volume of litigation involving labor and employment statutes before the Court it is doubtful that the same can be said about the Burger Court's decisions in labor law. The Nation's first comprehensive anti-discrimination legislation, title VII of the Civil Rights Act of 1964,¹ presented the Court with a fresh slate upon which to write. In addition, frequent and litigation-generating reversals of precedent by the Reagan National Labor Relations Board (NLRB)² brought many issues before the Burger Court, which seems destined to leave a mark in the labor law area at least as durable as that of its predecessor.

The Court's handling of its labor law docket during these past seventeen years has provided a series of statutory interpretations which have produced a tilt towards management over labor on the issues of greatest import. But the Court cannot be said to be anti-labor or, to be more precise, profoundly less sympathetic to organized labor than was the Warren Court. True, in cases involving the National Labor Relations Act (NLRA) — admittedly a declining percentage of what is now placed under the rubric of labor and employment law — the Warren Court decided more cases in favor of unions than did the Burger Court.³

Perhaps even more revealing is the fact that the Burger Court's pro-union stance involved an affirmance of NLRB decisions and orders and consequent deference to Board expertise in a substantially greater number of cases than was true of the Warren Court. Accordingly, the Warren Court was willing to stake out a pro-union position on its own initiative more frequently than the Burger Court.

Statistics, however, are sometimes superficial, especially if one takes into account some of the doctrinal legacies of the Warren

1. 42 U.S.C. §§ 2000a-2000aa-12 (1982).

2. Compare Walther, *The NLRB Today*, 36 LAB. L.J. 803 (1985) with Modjeska, *The Reagan NLRB, Phase I*, 46 OHIO ST. L.J. 95 (1985). See generally Gould, *Fifty Years Under the National Labor Relations Act: A Retrospective View*, 37 LAB. L.J. 235 (1986); Gould, *Mistaken Opposition to the NLRB*, N.Y. Times, June 20, 1985, at A27, col. 2; Gross, *Conflicting Statutory Purposes: Another Look at Fifty Years of NLRB Lawmaking*, 39 INDUS. & LAB. REL. REV. 7 (1985).

3. A survey of NLRB cases decided by the Burger Court shows that out of the 53 opinions which favored either labor or management, unions prevailed in 31 (58.4%). For the Warren Court, of 55 decisions favoring one side or other, unions prevailed in 44 (80%). For the period between the passage of the National Labor Relations Act (NLRA) until September of 1953, of 79 decisions favoring either labor or management, "pro-labor" positions prevailed in 60 opinions (77%).

Court. In truth, the Burger Court has pushed the pendulum that was already swinging in its direction — the beat goes on — although, as we shall see, *marcato* — with emphasis.

The point is made in a more telling fashion if one recalls a number of the Warren Court's landmark decisions. Three of its labor law decisions presented themes developed more fully by the Burger Court. The first is *NLRB v. Babcock & Wilcox*,⁴ in which the Warren Court, despite the Stone Court's holding that union solicitation and distribution of literature on company property was protected activity,⁵ held that nonemployee union organizers could not distribute literature on company working lots unless there were no alternative avenues of communication available.⁶ The Court itself later characterized this rule as a presumption against union access to company property.⁷ In fact, the self-organizational rights of employees were at stake in both cases — arguably even more at stake when the potential sophistication and expertise of nonemployee union organizers were involved. Nevertheless, *Babcock & Wilcox* gave these employee rights short shrift in deference to employer property rights.

In a second holding, *Textile Workers Union v. Darlington Mfg. Co.*,⁸ almost a decade later, the Court again exalted employer property interests and management prerogatives over employee statutory rights. This time, it held that an employer could close its plant, and thus deprive workers of jobs, for anti-union reasons — even though the statute forbids such conduct in all other contexts when the reason for the managerial decision is rooted in anti-union considerations. Both *Babcock & Wilcox* and *Darlington* laid the foundation

4. 351 U.S. 105 (1956).

5. Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945). See generally Gould, *The Question of Union Activity on Company Property*, 18 VAND. L. REV. 73 (1964); Gould, *Union Organizational Rights and the Concept of "Quasi-Public" Property*, 49 MINN. L. REV. 505 (1965). Ironically, the Burger Court articulated the rationale for *Republic Aviation*, albeit in a different context: "The place of work is a place uniquely appropriate for the dissemination of views concerning the bargaining representative and the various options open to the employees." *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1975).

6. It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.

Babcock & Wilcox Co., 351 U.S. at 112.

7. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180 (1978).

8. 380 U.S. 263 (1965).

for one of the Burger Court's most important holdings.⁹

Another telling decision is *International Brotherhood of Teamsters v. Vogt*¹⁰ where Justice Frankfurter, simultaneous with the Warren Court's first landmark civil liberty decisions,¹¹ characterized an earlier Supreme Court ruling equating picketing with constitutionally protected free speech as excessively "sweeping."¹² One is not required to accept Justice Douglas' dissent in *Vogt*, in which he states that the Court was signing a "formal surrender" for picketing as free speech, to observe that the Burger Court seems to have lost all sight of free speech, at least in the secondary picketing context.¹³ Again, however, it seems to me that the seeds were sown by the Warren Court and only cultivated more assiduously by its successor.

In a sense the Court's labor posture during this past half century of modern labor law mirrors societal developments in industrial relations outside the law, that is, a decline of unions in the United States. The Court's decisions have frequently left the labor movement without effective recourse to self-organizational and collective bargaining rights as the movement has sought to protect those whom it represents in an era of retreat. The added dimension seems to be that the Burger Court has denied the support of the law to our autonomous system of collective bargaining, and made its preservation a more formidable task. Again, however, the origins of the mischief may be found in an important Warren Court decision addressing which bargaining items are important enough to compel labor and management to bargain about. That decision, *NLRB v. Wooster Division of Borg-Warner*,¹⁴ ultimately permitted the Burger Court to give full reign to the very free enterprise policy considerations which were integral to the trilogy of decisions, *Babcock*, *Darlington* and *Vogt*.

All attempts, however, to promote union and collective bargaining autonomy have not been failures. It is not without significance that most of the key union victories at the Burger Court were obtained in conflicts with their own members and those whom they represent. Three examples demonstrate this point well.

The first is *International Brotherhood of Teamsters v. United*

9. That decision was *NLRB v. Wooster Div. of Borg-Warner*, 356 U.S. 342 (1958). See *infra* note 14 and accompanying text.

10. 354 U.S. 945 (1957).

11. See *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Watkins v. United States*, 354 U.S. 178 (1957).

12. Justice Frankfurter's reference is to *Thornhill v. Alabama*, 310 U.S. 88 (1940).

13. E.g., *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980).

14. 356 U.S. 342 (1958).

States,¹⁵ in which the Court held, 7-2, that a collective bargaining agreement's denial of retroactive seniority credits to black and Mexican-American workers, historically locked into lower paying and less desirable jobs as they advance into all white departments, was not a violation of title VII of the Civil Rights Act of 1964 — which prohibits discrimination in employment on account of race, color, sex, religion and national origin. Justice Stewart, writing for the Court, relied upon the legislative history surrounding the statute's "bonafide seniority" proviso which states that a nondiscriminatory seniority system is not an unlawful employment practice under the Act. The critical flaw in the Court's analysis, in my opinion, is that Congress expressed no view about departmental or job seniority — the concern was that employees in all white plants or craft union members not be deprived of seniority by heretofore unemployed blacks.

Nevertheless, the Court purported to find legislative intent to deny incumbent black workers of retroactive seniority and to devise enormously time consuming and burdensome proceedings, subsequent to the trial, in which minorities and female workers must establish entitlement to retroactive seniority in the context of across the board discrimination which has already been proven at trial. The Court's opinions in both *Teamsters* and *Firefighters v. Stotts*¹⁶ cast an ominous shadow over the propriety of judicially imposed hiring and promotion quotas for some time — another source of conflict between blacks and unions.

At the same time, virtually all members of the Burger Court appear to have demonstrated some measure of solicitude for quotas and goals which have been voluntarily devised¹⁷ — though a majority of the Court sounded a note somewhat similar to that heard in *Teamsters* in condemning voluntary affirmative action when seniority rights are altered and layoffs are a consequence.¹⁸ Moreover, the Court, by holding that consent decrees as well as private agreements

15. 431 U.S. 324 (1977). My views on this matter are set forth in more detail in W. GOULD, *BLACK WORKERS IN WHITE UNIONS: JOB DISCRIMINATION IN THE UNITED STATES* 67-92 (1977); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEX. L. REV. 1039 (1969); Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964*, 13 HOW. L.J. 1 (1967).

16. 467 U.S. 561 (1984).

17. *United Steelworkers v. Weber*, 444 U.S. 889 (1979); Gould, *The Supreme Court and Labor Law: The October 1978 Term*, 21 ARIZ. L. REV. 621, 649-57 (1979).

18. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986). But see *United States v. Paradise*, 107 S. Ct. 1053 (1987) (promotions context).

may provide for race conscious affirmative action¹⁹ and that goals may be imposed to remedy "egregious discrimination" by unions and employers²⁰ has both promoted the interests of minority employees and rebuffed the Reagan Administration.

On the other hand, a second example of Burger Court approval of union hegemony over the interests of members in the context of a union-minority group controversy is *Emporium-Capwell v. Western Addition Community Organization*.²¹ In that case the Court held, 8-1, that employees who engage in unauthorized self-help picketing in protest of discriminatory employment conditions, undermine the union's role as exclusive bargaining representative and thereby engage in unprotected activity which exposes them to discharge or discipline. Because of the Court's exaggerated fear of the bargaining unit's balkanization, the holding fails to take into account the posture of dissidents confronted with an unresponsive union. Moreover, the goal of racially and sexually integrated union leaderships — the absence of which has inspired distrust and the kind of self-help involved in *Emporium-Capwell* — has hardly been realized.

Third, the Court held 5-4 in the *Sadlowski*²² decision that the Steelworkers' prohibition against outside financial assistance for union office candidates was a "reasonable qualification" upon the free speech rights of union members under the Landrum-Griffin Act's Bill of Rights. The Court refused to equate first amendment free speech rights with those protected by Landrum-Griffin.²³

Sadlowski, like *Teamsters* and *Emporium-Capwell*, is a victory for entrenched and sometimes unresponsive union bureaucracies over dissidents and minority workers — not a triumph for labor movement representation of workers. Here the unions have done well with the Burger Court when confronting the bosses themselves.

In some instances, as in a series of cases involving job security for employees represented by unions,²⁴ consumer secondary picketing,²⁵ and union authority to impose sanctions upon strikebreakers,²⁶ the Burger Court has undercut precedent adumbrated by the Warren Court. But in other areas, such as the recently discovered statutory

19. See *Local No. 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986).

20. See *Local No. 28, of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 106 S. Ct. 3019 (1986).

21. 420 U.S. 50 (1975). See Gould, *Black Power in the Unions: The Impact Upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969); Gould, *The Status of Unauthorized and "Wildcat" Strikes Under the National Labor Relations Act*, 52 CORNELL L.Q. 672 (1967).

22. *United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982).

23. *Id.* at 111.

24. See, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); *NLRB v. Burns Int'l Sec. Serv., Inc.*, 406 U.S. 272 (1972).

25. *NLRB v. Retail Store Employee Union, Local 1001*, 447 U.S. 607 (1980).

26. *Pattern Makers' League v. NLRB*, 105 S. Ct. 3064 (1985).

exclusion for managerial employees under the NLRA,²⁷ and the denial of remedial authority which includes the imposition of contract terms,²⁸ the Court has written on a relatively fresh slate. On the other hand, in the antitrust-labor²⁹ and duty of fair representation³⁰ arenas, the Court's handiwork can be seen as a logical extension of doctrine already wrought by the Warren Court.

Of course, one factor serves to impose limits upon any comments that may be made about the Burger Court. This is that a substantial number of the cases were decided by a 5-4 vote.³¹ This phenomenon reflects the obvious but frequently unpalatable truth that federal labor law, framed as it is in broad ambiguous language addressing matters about which Congress has been unable to provide definitive policy judgments, is federal labor policy defined by the NLRB and ultimately the Supreme Court. The Court is deeply divided on many aspects of this ongoing policy debate.

Some of the issues — like the Burger Court's 5-4 decision holding that an employer may not be ordered to bargain with the union as exclusive representative on the basis of majority support evidenced by authorization cards and picket line without independent unfair labor practice violations³² — have seen alignments on the Court which cut across ideological predisposition, if one can judge this factor on the basis of presidential appointments.³³ This is again true of

27. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (faculty members are endowed with "managerial status", which is sufficient to exempt them from the Act's coverage as "professional employees" under section 2(12) of the NLRA); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974). *But see* *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981).

28. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

29. *See Connell Constr. Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616 (1975). *Cf.* *H.A. Artists & Assoc., Inc. v. Actor's Equity Ass'n*, 451 U.S. 704 (1981).

30. *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983); *International Bhd. of Elec. Workers v. Faust*, 442 U.S. 42 (1979); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

31. A survey of labor law decisions of the Burger Court shows that out of 129 decisions, 22 were decided by a 5-4 vote. These 129 cases include 90 "labor management relations cases", 18 preemption cases, and 21 individual rights cases.

32. *Linden Lumber Div., Summer & Co. v. NLRB*, 419 U.S. 301 (1974) (Justice Brennan, Justice Rehnquist and Chief Justice Burger joined Justice Douglas' majority opinion).

33. *See, e.g., United Steelworkers v. Sadlowski*, 457 U.S. 102 (1982) (Justice Rehnquist joined in Justice Marshall's majority opinion and Chief Justice Burger and Justice Brennan were aligned in the dissent); *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971) (another 5-4 decision in which Chief Justice Burger and Justice Brennan joined in majority and Justice Marshall dissented); *Local 3489, United Steelworkers v. Usery*, 429 U.S. 305 (1977); (Chief Justice Burger aligned in the majority while Justice

cases in which the Burger Court reversed the Warren Court when, for instance, it declared that employer injunctions could be obtained against unions for contractual violations³⁴ — properly in my view — and refused to extend the holding to sympathy³⁵ and political strikes.³⁶

But the ideological polarization is evidenced by the frequently contrasting positions taken by Justice Brennan and Justice Rehnquist — as well as by Justice Marshall, Justice Blackmun and Chief Justice Burger.³⁷ Nothing more vividly marks the shift than the Court's recent 5-3 holding that workers may resign from unions to avoid discipline because of their statutorily protected right to refrain from union activity.³⁸ Twenty years ago the Warren Court held 5-4 that unions had a vital interest in imposing fines under the same circumstances to implement the strike's integrity³⁹ — despite the fact that the sanctions were imposed upon strikebreakers who were exercising the very same right to refrain which the Burger Court found so important in June 1985.⁴⁰

But at this point, the profound switch associated with the departure of the "nine old men" in the late 1930's has not developed in the labor law decisions of the 1980's; it is, for the most part, a change in emphasis. Moreover, since the Justices say that they believe in deference to the Board, at least when they want to,⁴¹ it is possible that if new Presidents appoint new NLRB members just as

Rehnquist joined the dissent). *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (in this 5-4 decision, Chief Justice Burger authored the anti-union majority aligned with Justice Rehnquist and Justice Brennan).

34. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970).

35. See, e.g., *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (Chief Justice Burger and Justice Rehnquist joined the majority while Justice Brennan and Justice Marshall dissented); see also Gould, *On Labor Injunctions Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978). *Contra* Atleson, *The Circle of Boys Market: A Comment on Judicial Inventiveness*, 7 INDUS. REL. L.J. 88 (1985).

36. *Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457 U.S. 702 (1982).

37. See generally Gould, *The Supreme Court's Labor and Employment Docket in the October 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1 (1981); cf. *NLRB v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980).

38. *Pattern Makers' League v. NLRB*, 105 S. Ct. 3064 (1985).

39. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

40. For further discussion of *Pattern Makers'* and *Allis-Chalmers*, see *infra* notes 81-86 and accompanying text.

41. As Justice Powell noted in *Pattern Makers'* "Because of the Board's 'special competence' in the field of labor relations, its interpretation of the Act is accorded substantial deference." *Pattern Makers'*, 105 S. Ct. at 3068. This difference has been recognized on numerous occasions. See, e.g., *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979); *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975). But see *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965). Justice Stewart stated "we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management." *Id.* at 316.

For a discussion of some of the Warren Court's decisions, see Modjeska, *Labor and the Warren Court*, 8 INDUS. REL. L.J. 479 (1986).

desirous of the repudiation of precedent as their predecessors⁴² that the Court, without regard to any change in ideological composition, will defer to more recently acquired administrative expertise. Conversely, new appointments to the Court by President Reagan before 1989 could produce the sharp swing to the right that has not yet fully developed. In the interim, we have *marcato*.

Meanwhile, paradoxes abound throughout the wide scope and variety of issues which confronted the Court. As noted, there were numerous 5-4 votes, but there are a number of examples of high tribunal unanimity — and in a number of these cases the balance has been weighted in favor of unions and employees.

A fairly recent example is *NLRB v. Transportation Management*⁴³ in which the Court unanimously held that when the Board proves that anti-union animus is a substantial and motivating factor in the employer's treatment of a worker, it makes out a prima facie case of statutory violation and the burden is then upon the employer to show that the employee would have been dismissed or disciplined in the same way regardless of the anti-union motivation.

What is particularly remarkable in this opinion is Justice White's dicta on behalf of the Court that the Board's previous approach to "mixed motive" cases, under which a statutory violation was found where simply one of a number of reasons for the discharge was impermissible (that is, anti-union motivation), was an approach which was compatible with the Act.⁴⁴ The Board's lack of success with the circuit courts of appeals both before and after its own change in position,⁴⁵ had led to its adoption of the more convoluted standard which was approved by the Court in *Transportation Management*. The Court also rejected the argument that the Taft-Hartley Amendments' proviso precluding relief for employees dismissed with "cause" had any applicability to the appropriate allocation of burden

42. The political character of the Board has been noted by commentators. See, e.g., Bierman, *Judge Posner and the NLRB: Implications for Labor Law Reform*, 69 MINN. L. REV. 881 (1985); Bierman, *Reflections on the Problem of Labor Board Instability*, 62 DEN. U.L. REV. 551 (1985); Gregory, *The National Labor Relations Board and the Politics of Labor Law*, 27 B.C.L. REV. 39 (1985); Gross, *supra* note 2; Summers, *Politics, Policy Making and the NLRB*, 6 SYRACUSE L. REV. 93 (1954); Note, *The NLRB under Republican Administration, Recent Trends and their Political Implications*, 55 COLUM. L. REV. 852 (1955).

43. 462 U.S. 393 (1983).

44. Justice White noted: "As we understand the Board's decisions, they have consistently held that the unfair labor practice consists of a discharge or adverse action that is based in whole or in part on anti-union animus." *Id.* at 401.

45. *Id.* at 399-401.

of proof.⁴⁶

An unanimous Court, speaking through Justice Powell, in *Metropolitan Edison v. NLRB*⁴⁷ held that an employer could not impose heavier sanctions or discipline upon union officials who, along with other employees, violated a "no strike" clause on the grounds that since they were union officials they possess more responsibility for such misconduct. Again, the Court, to the surprise of management labor lawyers, summarily rejected the contention that the union had waived the right of such officials to strike without additional sanctions where the contract had been renegotiated subsequent to arbitral decisions favoring such employer sanctions. The Court, noting the inapplicability of stare decisis principles to arbitration,⁴⁸ concluded that discipline different from that imposed upon other employees was lawful only when the union had explicitly waived the right of union officials to be treated in a uniform, nondiscriminatory fashion for no strike clause violations.

Viewed in context, both *Transportation Management* and *Metropolitan Edison* (which might have attracted dissenters offended by the short shrift provided by the Court to the arbitration process) are more surprising for their unanimity than for what is in the holdings and in the language of the opinions. In my view, the same is true of a third case in which the Court, speaking through Justice Brennan, unanimously reversed the Board and held that an employer was obliged to bargain with a union which had affiliated with a new labor organization through a union member-only vote.⁴⁹ And in yet a fourth instance of unanimity, *Ellis v. Brotherhood of Railway Clerks*,⁵⁰ the Court held that a union which had negotiated a security agreement under the Railway Labor Act could not use such dues payments obtained from objecting nonmembers for purposes such as organizing drives and general litigation.

The issue in *Ellis* stems largely from an earlier Burger Court decision, *Abood v. Detroit Board of Education*,⁵¹ which held that there was no constitutional barrier to an agency shop agreement between a public employer and teachers' union but that dissenting nonmembers

46. As Justice White emphatically stated: "We are quite sure . . . that the Court of Appeals erred in holding that § 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons." *Id.* at 401.

47. 460 U.S. 693 (1983); cf. Whitman, *Wildcat Strikes: The Unions' Narrowing Path to Rectitude?*, 50 INDUS. L.J. 472 (1975).

48. *Metropolitan Edison*, 460 U.S. at 708-09.

49. *NLRB v. Financial Inst. Employees, Local 1182*, 106 S. Ct. 1007 (1986).

50. 466 U.S. 435 (1984); see also *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986).

51. 431 U.S. 209 (1977). For a discussion of the peculiarities of the employee-employer relationship in the public sector, see Summers, *Public Employee Bargaining: A Political Perspective*, 83 YALE L.J. 1156 (1974).

could not be compelled to pay monies used for ideological causes which are not "germane" to collective bargaining. *Ellis* was an attempt to give meaning to the language employed in *Abood*.

The thesis advanced by Justice White for the Court in *Ellis* — and from which not one single Justice dissented — is that dues payments spent for organizing drives are not "germane" to the union's collective bargaining responsibilities in the unit and are therefore not within the scope of activities for which Congress intended unions to be relieved of "free rider" problems. The proposition that expenditures for organizational activity are not germane to collective bargaining and therefore cannot be imposed upon those who would otherwise be free riders, an idea which received no explication whatsoever by Justice White in *Ellis*, totally ignores what all observers of labor-management relations have known since the beginning of organized relationships between the two: Unions must organize and recruit new members to protect the gains and standards of those in the bargaining unit. This is especially so when the organizational activities are taking place amongst employers which are direct competitors of the enterprise in which the dues are collected — although the truth of this proposition seems to me to be self-evident in other situations as well.

The unanimity in *Ellis* constitutes the biggest surprise of all! It is beyond belief that not one single Justice would dissent from this otherworldly opinion. But the holding, while arising within the context of a union-dissident individual employee dispute, is symptomatic of the general tilt against the labor movement to which I have alluded.

JOB SECURITY

The Duty to Bargain Under the National Labor Relations Act

With the advent of concession bargaining in the late 70's and 80's and increased union setbacks, the focus of the labor movement has become job security. Ironically, in a major shift from guidelines — though admittedly tentative — of the Warren Court, the Burger Court left the job security interests of workers more imperiled than they were in the past.

The Warren Court held that an employer's contracting out of work involved terms and conditions of employment within the meaning of the Act⁵² and therefore constituted a mandatory subject of

52. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); see Summers,

bargaining under federal labor law. Inasmuch as the managerial decision in question would have left the workers with no jobs at all, it is difficult to discern the line of reasoning which assumes that such decisions are not a mandatory subject of bargaining. But the Court, speaking through Chief Justice Warren, in an opinion which seemed to be responsive to an influential concurring opinion by Justice Stewart,⁵³ attempted to strike a balance between management prerogatives on one side, and that which constituted terms and conditions of employment, on the other, even though the former are not referred to in the Act. The Court relied in part⁵⁴ upon the existence of negotiated contract provisions addressing the issue of contracting out as a basis for concluding that the issue was a mandatory subject of bargaining. Meanwhile, however, the Warren Court's *Darlington* opinion on plant closures signified much less solicitude for employee interests than that expressed in the contracting out context.

In any event, the Burger Court's first encounter with the mandatory subject issue hinted at a different approach altogether. In *Allied Chemical Workers v. Pittsburgh Plate Glass Co.*,⁵⁵ the Court held that the benefits of previously retired employees are not a mandatory item given that retired employees are not "employees" within the meaning of the Act. This rather strained reading of the statute failed to observe that unions and employers have traditionally dealt with such issues at the bargaining table. But the full retreat was still a decade away, and when it came, it induced Justice Brennan, the author of *Pittsburgh Plate Glass*, to switch to the dissenting side..

In 1981 by 7-2 vote, the Burger Court, in *First National Maintenance, Corp. v. NLRB*⁵⁶ concluded that a partial closure of a business was a management prerogative which unions could not compel employers to bargain over — even though the workers' jobs and conditions of employment were eliminated more completely than they would be in most contracting out cases. The rationale employed by Justice Blackmun for the majority rests upon a number of considerations.⁵⁷ But an overriding theme was that Congress, when it passed

Labor Law on the Supreme Court: 1964 Term, 75 YALE L.J. 59 (1965).

53. In his concurring opinion Justice Stewart wrote: "While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining." *Fibreboard Paper*, 379 U.S. at 233.

54. *Id.* at 211.

55. 404 U.S. 157 (1971).

56. 452 U.S. 666 (1981).

57. For a discussion of *First National Maintenance*, see Gould, *supra* note 37, at 6-18. The Congress could enact legislation requiring or encouraging consultation with unions and workers prior to plant closures. Four states have some form of plant closure legislation: Connecticut, Maine, Massachusetts, and Wisconsin. There are constitutional problems with state legislation in this arena. See Comment, *NLRA Preemption of State*

the Wagner Act in 1935, did not intend to have labor and management act as partners with one another, Senator Wagner's promotion of industrial democracy notwithstanding.⁵⁸ Said the Court: "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed."⁵⁹

Moreover, when it was contended that labor and management had indeed addressed the plant closure issue in collective agreements — the very point relied upon by the Warren Court to find that both sides were legally obliged to bargain about the decision in the contracting out case — an opposite inference was drawn. This time around the Court reasoned that such experiences demonstrated that invocation of the law was not necessary to bring about collective bargaining when plant closures were involved and the parties wanted to bargain. Since the parties were bargaining in spite of the law, legal intervention was unnecessary. The fact that other parties had been able to deal with threatened closures through negotiations signified not only their importance (for example, a dismissed worker will have no conditions of employment at all) but also that the matter is amenable to resolution through collective bargaining, a consideration which the Court stressed as an important one in *First National Maintenance*. Meanwhile, the Burger Court, which could not view a decision eliminating workers' jobs as a mandatory subject of bar-

and *Local Plant Relocation Laws*, 86 COLUM. L. REV. 407 (1986). Federal plant closing laws have been proposed periodically over the last few years. The latest bill (H.R. 1616) was defeated on November 21, 1985 by a 208-203 vote. H.R. 1616 would have required a 90-day notice for a layoff or plant shutdown affecting 100 or more employees, or 50-100 employees where the laid-off employees constituted at least 30% of the workforce. This year Senators Kennedy and Metzenbaum have introduced similar legislation in the form of Senate Bill 538. Even a Task Force created by the Reagan Administration has advocated notification prior to plant closings. See Economic Adjustment and Worker Dislocation in a Competitive Society, Report of the Secretary of Labor's Task Force on Economic Adjustment and Worker Dislocation (Dec. 1986). For a discussion of foreign experience, see W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 94-116 (1984). Developments in both Europe and Japan make it clear that access to information on a continuous basis is more important than notification, consultation or bargaining at the time of plant closure. Gould, *Union Involvement in Employer Decision-making: Some Reflections on America and Europe*, 58 TUL. L. REV. 1322 (1984). American law as developed by both the Warren and Burger Courts, is not particularly helpful. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

58. For the view that Senator Wagner originally intended that Act to create broad "freedoms" and industrial democracy, see Keyserling, *The Wagner Act: Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960).

59. *First Nat'l Maintenance*, 452 U.S. at 676.

gaining, concluded that mandatory bargaining nevertheless enveloped management's decisions relating to food prices in vending machines!⁶⁰

First National Maintenance therefore stands some of the Warren Court's precedent on its head.⁶¹ My view is that the Warren Court's decision provided broad scope for NLRB and Supreme Court value judgments⁶² relating to what constitutes mandatory and nonmandatory subjects of bargaining and the consequent mischief contained in *First National Maintenance*. The broadest possible scope ought to be given to both parties to bring issues to the bargaining table. The Burger Court took the opportunity provided by Warren Court precedent to override this policy in the name of management prerogatives.

The Successorship Cases

The Warren Court had gone far towards circumventing traditional privity of contract notions in the labor law arena by holding that a union could compel arbitration with a successor employer which had not entered into a collective bargaining agreement itself but rather could be said to have inherited it from another. Some of the Court's reasoning in the case which established the precedent, *John Wiley & Sons v. Livingston*,⁶³ can be seen in Justice Harlan's opinion for the Court which had been concerned about job security and said the following:

Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by 'the relative strength . . . of the contending forces.'⁶⁴

A remarkably different theme on the successorship issue was soon to be sounded by the Burger Court. In *NLRB v. Burns International Security Services*,⁶⁵ the Court held that a refusal to adhere to the terms of the collective bargaining agreement negotiated by the pred-

60. *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979).

61. See, e.g., *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203 (1964); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

62. See J. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983).

63. 376 U.S. 543 (1964).

64. *Id.* at 549 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960)).

65. 406 U.S. 272 (1972).

ecessor was not an unlawful refusal to bargain by the successor employer. The Court in *Burns* viewed the *Wiley* accommodation between freedom of contract and labor law principles to be a "limited" one inapplicable to a successor employer which was "ordinarily free to set initial terms on which it will hire the employees of a predecessor"⁶⁶ and to determine which employees would be hired — so long as there was not refusal to hire for anti-union reasons. On this point the Court was unanimous, although Justice Rehnquist on behalf of the Chief Justice, Justices Brennan and Powell sharply dissented from the conclusion that the successor could be obligated to bargain and opined that the imposition of the duty to bargain

would import unwarranted rigidity into labor-management relations . . . [said the Court] . . . an employer who has currently gained production orders at the expense of another may well wish to hire employees away from that other. There is no reason to think that the best interests of the employees, the employers, and ultimately of the free market are not served by such movement.⁶⁷

Finally, two years after *Burns*, the Court in *Howard Johnson*,⁶⁸ over Justice Douglas' lone dissent, held that the principles of *John Wiley & Sons* were not applicable where the successor did not hire a majority of the predecessor's work force. The Court's rule providing both freedom to hire new employees in most instances, and a greater likelihood that new companies would have statutory and contractual obligations imposed upon them where the majority of the old work force is hired, has created an incentive and opportunity for employers to avoid unions and collective bargaining agreements.

Here, as in *First National Maintenance* the Court's view of labor law did not produce substantial division within its own ranks. No member of the Burger Court would have revived the language, and seemingly the holding, of *John Wiley & Sons*. No clear break between the Burger Court and Warren Court — at least between their members — is immediately evident.

66. *Id.* at 294.

67. *Id.* at 308 (Rehnquist, J., dissenting).

68. *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Bd., Hotel & Restaurant Employees Int'l Union*, 417 U.S. 249 (1974); *cf.* *Local No. 434 v. Sky Vue Terrace, Inc.*, 119 L.R.R.M. (BNA) 2097 (3d Cir. 1985); *Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276 (7th Cir. 1981); *Lever Bros. Co. v. International Chem. Workers Local 217*, 554 F.2d 115 (4th Cir. 1976).

The accommodation between labor and bankruptcy law has provoked yet another 5-4 decision — again on the side of the employer interests and against the job security concerns of the employees — in the *Bildisco*⁶⁹ case. Justice Rehnquist's majority opinion concluded that the NLRA's prohibition against repudiation of collective bargaining agreements could be ignored by virtue of the policies contained in the Bankruptcy Act. The Court held that the filing of a bankruptcy petition could preclude enforcement of the collective bargaining agreement when the equities were balanced in favor of rejecting the labor contract. But as Justice Brennan said in dissent: "[T]he Court points to no provision of that [Bankruptcy] Code that purports to render § 8(d) [prohibiting the termination and modification of collective bargaining agreements] inapplicable, and to no provision of the NLRA that would preclude the application of § 8(d)."⁷⁰ The Court thus provided no true accommodation between labor and bankruptcy law. Congress has partially reversed the Court on this matter⁷¹ thus providing some measure of support for the view that the Court's *Bildisco* holding did not accurately reflect congressional intent as contained in the two statutes.

EMPLOYEES PROTECTED BY THE NATIONAL LABOR RELATIONS ACT

In three major decisions, the Burger Court resolved questions about protection and coverage under federal labor law against the interests of unions and employees. Although the Act excludes from the definition of employees such individuals as supervisors,⁷² independent contractors, domestic servants, and spouses of employers,⁷³ the Court in *NLRB v. Bell Aerospace Co.*,⁷⁴ held that managerial employees who make corporate policy are not employees within the meaning of the Act and thus are excluded from its coverage — even though the statute does not refer to them in the list of exclusions.

But the Court's 1980 opinion, *NLRB v. Yeshiva University*,⁷⁵ was even more remarkable in its definition of what constituted a managerial employee. Here, the Court concluded that university professors who had some degree of autonomy in defining their jobs and who operated under a system of self-governance — under which it was assumed that recommendations were frequently implemented as policy — were not employees within the meaning of the Act. The as-

69. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

70. *Id.* at 539 (Brennan, J., dissenting).

71. 11 U.S.C. § 1113 (1982).

72. 29 U.S.C. § 152(11) (1982).

73. *Id.*

74. 416 U.S. 267 (1974).

75. 444 U.S. 672 (1980).

sumption of the Court, again in a 5-4 vote, was that an adversarial model of employee-employer relations⁷⁶ is a prerequisite for collective bargaining under federal labor law.

One of the most remarkable elements of the Court's reasoning in *Yeshiva* was that a model of cooperation in which job autonomy and responsibility is promoted in the interest of mature industrial relations relationships meant that the statute did not apply. The logic of *Yeshiva* cuts not only against the grain of common sense and modern industrial relations development, but also would argue against statutory coverage for janitors, for instance, if they were given substantial responsibility in defining their job and a framework for employee views which provided that they would be seriously considered. Again, the decision's origins seem to lie in the adversarial ideology ironically promoted by Justice Brennan in a very different context.⁷⁷ Along with *First National Maintenance*, the Burger Court's decision in *Yeshiva* seems to have unsettled new efforts to inspire employee loyalty within the framework of collective bargaining and thus obtain cooperation and mature relationships.

A third decision, *Sure-Tan Incorporated v. NLRB*,⁷⁸ again a 5-4 split, has engendered even more confusion. Once again, the Court seems to have come down on the same policy side as in *Bell Aerospace* and *Yeshiva*. In *Sure-Tan* the Court was confronted with a question of whether illegal aliens are employees within the meaning of the Act. Justice O'Connor, writing for the majority concluded that for a number of reasons the question must be answered affirmatively.⁷⁹ But the Court's holding made it unlikely that the employees would receive the remedies under the Act, that is, reinstatement and back pay. The Court specifically rejected the view that a presumption of back pay for a six month period was appropriate, concluding that this rule was erroneous inasmuch as employees must be ready and able to work during the time for which they receive back pay. Inasmuch as the employees may not be within the country subsequent to their unlawful dismissal by the employer because the em-

76. "The act was intended to accommodate the type of management employee relations that prevail in the pyramidal hierarchies of private industry." *Id.* at 680.

77. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477 (1960). Here the Court justified its hostility to the regulation of economic weaponry on the ground that such an approach would be inconsistent with an adversarial model of industrial relations. See Gould, *supra* note 2.

78. 467 U.S. 883 (1984).

79. *Id.* at 892.

ployer has arranged for their deportation,⁸⁰ it is difficult for the employees to obtain the remedies provided under the Act.

UNION DISCIPLINE AND INTEGRITY OF THE STRIKE

In a 5-4 decision rendered in 1967⁸¹ a Warren Court majority had held that the imposition of court-enforceable union fines against "full union members" did not restrain or coerce employees in the exercise of their rights to refrain from union activities under the Act. But in 1972, Justice Douglas, speaking for the Court over Justice Blackmun's "lone solitary dissent", held that it was an unfair labor practice for unions to impose fines upon workers who had resigned their membership.⁸² Thus, the major issue that developed before the Burger Court was whether the Act's promotion of collective bargaining and the right of workers to both engage in and refrain from union activities contemplated some kind of accommodation between union and individual employee interests which would allow fines to be imposed upon those workers whose right to resign was limited through union constitutional restrictions. The Burger Court answered this question in the negative and upheld the Board's ruling that fines imposed upon workers who resign in the teeth of union rules constituted unlawful restraint and coercion.

In *Pattern Makers' League v. NLRB*,⁸³ the Court held that the Board's rule was a "reasonable" one and that union fines imposed upon those who had resigned curtailed the right to refrain from union activity. Said Justice Powell, speaking for a 5-3 majority: "We believe that the inconsistency between union restrictions on the right to resign and the policy of voluntary unionism supports [the view that union restrictions upon the right to resign are] . . . invalid."⁸⁴ The Court reached its conclusion on what Justice Blackmun, in dissent characterized as "[a]n unspoken concept of voluntary unionism that, carried to its extreme, would deny to the union member — in the name of having his participation in the union be voluntary — the right to make any meaningful promise to his co-workers."⁸⁵

I am of the view that the Warren Court's precedent was correct in its protection of the right to strike as a part of federal labor policy and that it provided the Court with an opportunity in 1985 to instruct the Board to accommodate the competing institutional interests (all of them statutorily protected) of union members vis-a-vis

80. *Id.* at 903.

81. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

82. *NLRB v. Granite State Joint Bd., Textile Workers Union, Local 1029*, 409 U.S. 213 (1972).

83. 105 S. Ct. 3064 (1985).

84. *Id.* at 3070.

85. *Id.* at 3082 (Blackmun, J., dissenting).

dissidents.⁸⁶ The Court missed the opportunity. So also did the dissent which suggested no guidelines relating to an accommodation between the right to engage in and refrain from union activities and which — as Justice Powell's majority opinion properly noted — was therefore equally deficient in shaping a balance.

SECONDARY PICKETING

In *NLRB v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*,⁸⁷ the Warren Court had held that secondary consumer picketing was not violative of the secondary boycott prohibitions contained in the NLRA where the primary employer was only one of a number of suppliers to a retail supermarket. The theory of the Court, undoubtedly unrealistic, was that such a secondary employer was not coerced — whereas if the secondary was totally or primarily dependent upon a primary it might well be. A basis for the Court's statutory construction seemed to be that a more expansive prohibition would place the first amendment's free speech provisions, which are applicable to picketing, on a collision course with the restrictions of *Landrum-Griffin*. The opinion authored by Justice Brennan seemed also to rest upon a distinction between so called "publicity" and "signal" picketing.⁸⁸

In *NLRB v. Retail Store Employees Union (Safeco)*,⁸⁹ Justice Powell, speaking for the Court, concluded that secondary consumer picketing aimed at a secondary who is dependent upon the primary would leave "responsive consumers no realistic option other than to boycott the title companies [secondary employer] altogether."⁹⁰ The Court concluded that whereas the secondary picketing in *Tree Fruits* provided only "incidental injury to the neutral" employer by virtue of the "natural consequence of an effective primary boycott," consumer product picketing in these circumstances could "be expected to threaten neutral parties with ruin or substantial loss" and therefore were violative of the secondary boycott prohibitions in the

86. See Gould, *Solidarity Forever — Or Hardly Ever: Union Discipline, Taft-Hartley, and the Right of Union Members to Resign*, 66 CORNELL L. REV. 74 (1980).

87. 377 U.S. 58 (1964).

88. We have examined the legislative history of the amendments to § 8(b)(4), and conclude that it does not reflect with the requisite clarity a congressional plan to proscribe all peaceful consumer picketing at secondary sites, and, particularly, any concern with peaceful picketing when it is limited . . . to persuading Safeway customers not to buy Washington State apples

Id. at 63.

89. 447 U.S. 607 (1980).

90. *Id.* at 613.

statute.⁹¹

The Court rejected contentions that the Constitution may not prohibit such a broad ban against peaceful picketing when, said Justice Powell, picketing “spreads labor discord by coercing a neutral party to join the fray.”⁹² Little discussion followed except citation to secondary picketing cases in which employees were induced to cease work and to engage in stoppages. Justice Stevens, however, in a separate concurring opinion, concluded that the constitutional issue was “not quite as easy as the plurality would make it seem . . . ,” but concluded that the Constitution was not offended where restrictions were imposed upon picketing in “furtherance of objectives deemed unlawful by Congress.”⁹³ Said Justice Stevens, “[t]he statutory ban in this case affects only that aspect of the union’s efforts to communicate its views that calls for an automatic response to a signal, rather than a reasoned response to an idea.”⁹⁴

The picketing in *Safeco*, however, was publicity picketing which in the past, particularly in *Tree Fruits*, had been distinguished from signal picketing. Justice Steven’s *sub silentio* burial of the distinction between publicity and signal picketing was approved by the Court in a subsequent opinion by Justice Powell two years later.⁹⁵ In that case, the Court cited Justice Stevens’ concurring opinion when it said: “We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment. It would seem even clearer that conduct designed not to communicate but to coerce merits still less consideration under the First Amendment.”⁹⁶

UNION SOLICITATION, PICKETING, AND STRIKES

The Burger Court has continued the line of authority developed by its predecessor designed to promote the rights of employees to solicit other workers on company property during nonworking time — it has even invalidated portions of collective bargaining agreements which have prohibited the right to solicit⁹⁷ and has protected the distribution of literature on company property which addressed mini-

91. *Id.* at 614-15.

92. *Id.* at 616.

93. *Id.* at 618 (Stevens, J., concurring). See generally Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574, 591-602 (1951); cf. Goldman, *The First Amendment and Non Picketing Labor Publicity Under Section 8(b)(4)(ii)(B) of the National Labor Relations Act*, 36 VAND. L. REV. 1469 (1983); Harper, *The Consumer’s Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984).

94. *Retail Store Employees*, 447 U.S. at 619.

95. *International Longshoremen’s Ass’n v. Allied Int’l, Inc.*, 456 U.S. 212 (1982).

96. *Id.* at 226 (quoting *Retail Store Employees*, 447 U.S. at 616) (citations omitted).

97. *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974).

mun wage and right to work legislation.⁹⁸ But employee interest in nonemployee union organizational access has received less attention and protection.

In the *Logan Valley*⁹⁹ decision — a case which bears upon both picketing and solicitation on private property — the Warren Court held that picketing in a privately owned shopping center was protected by the first amendment. In *Central Hardware Co. v. NLRB*¹⁰⁰ the Burger Court, in an opinion authored by Justice Powell, addressed the applicability of the *Logan Valley* principle to nonemployee union organizer solicitation of workers in a retail establishment parking lot. In *Central Hardware*, the Court refused to expand statutory principles announced by the Warren Court which create a presumption against nonemployee union organizational activity, refused to apply constitutional principles to such issues, and hinted at the demise of *Logan Valley*, which was soon to come.

Subsequently, the Court announced both the reversal of *Logan Valley* and the fact that new statutory principles might apply to picketing as opposed to solicitation. Said the Court:

The locus of [the] accommodation [between the protection of employees and private property rights] . . . may fall at differing points along the spectrum depending on the nature and strength of the respective [employee] . . . rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this accommodation must rest with the Board in the first instance.¹⁰¹

Meanwhile, however, despite the fact that the Board has treated this mandate expansively, the Court carefully circumscribed union rights by holding that an employer could enforce state trespass laws against picketing on private property regardless of federal law.¹⁰² An important element in the Court's reasoning — this time expressed by Justice Stevens — was that trespassory organizational activity by nonemployees was more likely to be unprotected than protected

98. *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

99. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

100. 407 U.S. 539 (1972).

101. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976).

102. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 447 U.S. 935 (1978). This case involved the doctrine of preemption, as do countless other confusing and perplexing discussions of the Warren and Burger Courts. See Cox & Seidman, *Federalism and Labor Relations*, 64 HARV. L. REV. 211 (1950); Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Gould, *The Garmon Case: Decline and Threshold of 'Litigating Elucidation'*, 39 U. DET. L.J. 539 (1962); Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: II*, 59 COLUM. L. REV. 269 (1959).

under the statutes. Accordingly, reasoned the Court, any potential collision between state and federal law and the erosion of the latter was minimal.

Finally, the Court, in another preemption case in which it found itself divided again, may have created mischief and an additional incentive for employers to resist strikes and the reinstatement of strikers.¹⁰³ It is to be recalled that unfair labor practice strikers have the right to reinstatement but economic strikers whose conduct is not prompted by employer illegal conduct may be permanently replaced. The Burger Court's rules, outlined below, incite litigation about whether a strike is of the unfair labor practice or economic variety because jobs are at stake — litigation that may take years to complete.

In *Belknap, Inc. v. Hale*¹⁰⁴ the majority of the Court held that a strikebreaking employee who replaces a striker and is promised permanent status and is subsequently replaced by the employer pursuant to settlement and litigation before the NLRB may sue in state court for wrongful discharge.¹⁰⁵ Given the greater reliance upon strikebreakers by employers, one cannot assume that this decision will necessarily make most companies reluctant to hire permanent replacements for strikers, although the rise in wrongful discharge litigation may make some employers more fearful about hiring strike replacements. But it may well increase resistance to reinstatement of strikers in the context of unfair labor practice litigation because of a concern with the wrongful discharge actions that may follow such decisions.

CONCERTED ACTIVITY

The concerted activity cases also demonstrate the proposition that the balance has not swung entirely against labor. By 5-4 vote, the Court, this time speaking through Justice Brennan, held that an employee who refused to drive a truck which he believed to be unsafe could not be discharged where the collective bargaining agreement provided that employees were not required to operate unsafe vehicles.¹⁰⁶ The Court held that even through the employee was not act-

103. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). State regulation of the strike has been allowed more recently in *Baker v. General Motors Corp.*, 106 S. Ct. 3129 (1986).

104. 463 U.S. 491 (1983).

105. *Id.* at 512. Preemption issues applicable to state wrongful discharge actions first presented themselves to the Burger Court in *Allis-Chalmers Mfg. Co. v. Lueck*, 105 S. Ct. 1904 (1985). See generally Gould, Hay & Rosenfeld, *When State and Federal Laws Collide: Preemption — Nightmare or Opportunity?*, 9 INDUS. REL. L.J. 4 (1987); To Strike A New Balance: A Report of the Ad Hoc Committee on Termination-at-Will and Wrongful Discharge, at 16-23 (Feb. 8, 1984) (Appointed by the Labor and Employment Section of the State Bar of California).

106. *NLRB v. City Disposal Sys.*, 465 U.S. 822 (1984). On concerted activity as a

ing on his own, the activity was nonetheless concerted and therefore protected under the NLRA. Said the Court:

The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process — beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement — is a single, collective activity.¹⁰⁷

In holding that the action in question constituted “constructive” concerted activity, the Court relied¹⁰⁸ upon another Burger Court opinion authored by Justice Brennan — also promoting union and employee interests — in which the Court held that in a disciplinary investigatory interview that might lead to the employee’s discharge, the employee had a statutory right to be represented by a union representative.¹⁰⁹ This holding may have laid the groundwork for the Courts’ reversal of a Reagan Board decision that a single employee cannot engage in concerted activity when protesting employment conditions which are of concern to the group.¹¹⁰

STATUTORY RESTRICTIONS UPON UNION ACTIVITY

In cases involving both antitrust liability for unions as well as the circumstances under which injunctions may be imposed for violations of no strike clauses¹¹¹ the Burger Court initially came down on the side of restrictions and liability. The Court now seems to have limited the sweep of antitrust liability in a case interpreting the NLRA,¹¹² and in two other important decisions upholding collective bargaining agreements which allowed the longshoremen to recapture a work loss caused by containerization.¹¹³ The agreements were upheld against the contention that they constituted secondary interference with warehouse employers whose employees were stuffing and unstuffing containers.

prerequisite for protected status, see W. GOULD, A PRIMER ON AMERICAN LABOR LAW 95-98 (2d ed. 1986).

107. *City Disposal Sys.*, 465 U.S. at 831-32.

108. *Id.* at 830.

109. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

110. *Meyers Indus.*, 268 N.L.R.B. 493 (1984).

111. *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235 (1970); see also *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974); Cantor, *Strikes over Non-Arbitrable Labor Disputes*, 23 B.C. L. Rev. 633 (1982). See generally Gould, *On Labor Injunctions, Unions and the Judges: The Boys Market Case*, 1970 SUP. CT. REV. 215; Gould, *supra* note 35.

112. *Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645 (1982).

113. *NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490 (1980); *NLRB v. International Longshoremen's Ass'n*, 473 U.S. 61 (1985).

Finally, in a 5-4 decision the Court held that injunctive relief for violations of no strike clauses does not extend to sympathy stoppages.¹¹⁴ I have long thought Justice Stevens' dissent as much the better of the arguments. But the Court has not yet recanted and indeed has extended the sympathy strike principle to political strikes, even though the union gave a binding contractual commitment not to strike in both cases.

DUTY OF FAIR REPRESENTATION

While the Court held that the union could violate its duty of fair representation and obligation to employees through the manner in which it conducted the case before a tribunal,¹¹⁵ the fact is that in a series of decisions the positions of unions and employer defendants in duty of fair representation litigation has been eased considerably. In *IBEW v. Foust*,¹¹⁶ a 5-4 majority of the Court held that punitive damages could not be obtained against a union which had violated its duty of fair representation and obligation. And in the Court's *Del Costello*¹¹⁷ decision a relatively abbreviated statute of limitations for unions fending off duty of fair representation cases — that is, the six month period applicable to unfair labor practice disputes under the Act — meant the unions were able to successfully dismiss many cases that might have kept them in the courts before jurors for years to come.

Nevertheless, on balance, these decisions must be viewed as part of the long series of pro-arbitration decisions which have flowed in the wake of the Warren Court's *Steelworkers Trilogy*,¹¹⁸ which have been designed to promote the integrity of the grievance-arbitration

114. *Jacksonville Bulk Terminals, Inc. v. International Longshoreman's Ass'n*, 457 U.S. 702 (1982).

115. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976). The Court thus extended the principles articulated in *Vaca v. Sipes*, 386 U.S. 171 (1967). On the duty of fair representation, see generally Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 PA. L. REV. 251 (1977); Tobias, *The Plaintiff's View of '301-DFR' Litigation*, 5 EMPLOYEE REL. L.J. 510 (1980); Vandervelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 MINN. L. REV. 1079 (1983); Goldberg, *The Duty of Fair Representation: What the Courts Do In Fact*, 34 BUFFALO L. REV. 89 (1985). The Burger Court decided what will surely be the first in a series of cases dealing with the application of the *Steelworkers Trilogy* principles to public policy considerations in arbitration. See *W.R. Grace Co. v. Local 759, Rubberworkers*, 461 U.S. 757 (1983).

116. 442 U.S. 42 (1979).

117. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

118. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See Aaron, *Judicial Intervention in Labor Arbitration*, 20 STAN. L. REV. 41 (1967); Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954); Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1954).

machinery contained in the collective bargaining agreement and not so much designed to promote the effective functioning of unions in the bargaining relationship. The Court's most recent decision, and perhaps the most important decision in the duty of fair representation arena, makes this point well.

In *Bowen v. U.S. Postal Service*,¹¹⁹ a 5-4 majority of the Burger Court imposed a major portion of damage liability upon unions in duty of fair representation cases. It has done this through calculating the union's liability from the time at which the grievance should have gone before an arbitrator. Since the major portion of time the parties are liable for damages suffered is after the time that arbitration should have taken place — given the substantial delay involved in bringing the case before judge and jury — this means that unions carry the major burden of liability in the bulk of fair representation cases. Whether the rule is rigidly applied or the unions are able to negotiate contractual provisions which will permit them to elude liability remains to be seen. But *Bowen* most certainly provides a tilt in favor of management and against labor.

CONCLUSION

There is a certain irony in some of the major Burger Court "union victories." The most important decisions seem to have taken place at the expense of the workers that they represent. *Teamsters* has made it more difficult for blacks, Mexican-Americans and women to fight job discrimination. *Emporium-Capwell* has made resort to self-help and a balance between union authority and the right of dissidents to protest when the union is not responsive more difficult. *Sadlowski* promotes the entrenchment of incumbent officials under a statute which is designed to promote democracy.

In all of these areas there is no shift from the Warren Court. Indeed, the opinions' authors were Warren Court members — Justice Marshall in *Emporium Capwell* and *Sadlowski*, and Justice Stewart in *Teamsters*.

The Burger Court cannot be characterized as anti-labor — any more than the Warren Court could be characterized as pro-labor — although a greater number of cases were decided by the Burger Court for employers. The Burger Court's more sweeping decisions in the job security area — *First National Maintenance* and *Howard Johnson* are the most prominent decisions — find their roots in the

119. 459 U.S. 212 (1983).

Warren Court's *Darlington*¹²⁰ decision which characterized management's right to close a plant as a prerogative which could not be limited by law even if motivated by anti-union considerations. The same is true of secondary picketing. Even *Yeshiva* might be seen as tied to *Insurance Agents* and Justice Douglas' 1947 dissent in *Packard Motor Co. v. NLRB*¹²¹ which prompted Congress to exclude supervisors from the Act's coverage because of the assumed adversarial relationship between labor and management.

If anything, however, the Burger Court decisions in the labor law arena represent a continued swing of the pendulum against the interests of organized labor. This undoubtedly reflects an increasingly hostile environment with which organized labor is confronted — the roots of which extend far beyond law itself — and thus is an example of the Court not only reading the election returns, but also reading the mood of the country.

Thus, the Burger Court did not move the pendulum in a different direction. The pendulum's swing has just been accelerated. The beat goes on — *marcato*.

120. *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

121. 330 U.S. 485 (1947).